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10                  CLERK U.S. DISTRICT COURT  
11                  WESTERN DISTRICT OF WASHINGTON  
12                  DEPUTY

13                  IN THE UNITED STATES DISTRICT COURT  
14                  FOR THE WESTERN DISTRICT OF WASHINGTON

15                  STORMANS, INCORPORATED doing business  
16                  as RALPH'S THRIFTWAY; RHONDA  
17                  MESLER, MARGO THELEN

18                  Plaintiffs,

19                  vs.

20                  MARY SELECKY, Acting Secretary of the  
21                  Washington State Department of Health;  
22                  LAURIE JINKINS, Assistant Secretary of  
23                  Washington Health Systems Quality Assurance,  
et. al,

Defendants.

**Oral Argument Requested**

MOTION FOR PRELIMINARY  
INJUNCTION

Civil Action No. C07-5374

**NOTE ON MOTION CALENDAR:**  
**August 10 , 2007**

15                  **I. INTRODUCTION**

16                  Even though the "morning-after" pill is widely available throughout Washington State,  
17                  the Washington Board of Pharmacy (Board) recently passed regulations that prohibit  
18                  pharmacies and pharmacists from refusing to dispense the drug for moral or religious reasons.  
19                  Codified as WAC 246-863-095 and WAC 246-869-010 (the Rules), these regulations became  
20                  effective today, July 26, 2006.

21                  During the Board's rule-making process, the Washington Human Rights Commission  
22                  publicly threatened that pharmacies and pharmacists, who refuse to stock or dispense Plan B  
23

MOTION FOR PRELIMINARY INJUNCTION- 1

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1 due to their religious convictions, engage in sex discrimination and violate RCW 49.60. The  
2 Commission suggested that pharmacists and pharmacies risk their licenses, and the Board even  
3 risks liability itself, if it permits any right of conscience.

4 Plaintiffs, pharmacy-owner, Stormans, Inc. d/b/a Ralph's Thriftway, and pharmacists,  
5 Rhonda Mesler and Margo Thelen, believe that life begins when an egg is fertilized. The  
6 morning-after pill also known as "Plan B" can prevent implantation of a fertilized egg. As  
7 health-care providers and Christians, Plaintiffs' deeply-held religious beliefs prevent them  
8 from participating in the destruction of human life by selling Plan B.

9 But that is exactly what the Washington Board of Pharmacy and Human Rights  
10 Commission demand that Plaintiffs do. The Board has concluded the investigation against  
11 Ralph's for its refusal to stock the drug and has referred the matter to legal counsel. Now that  
12 the Rules are in effect, Ralph's expects the Board to file disciplinary charges against it any day.

13 The Rules and Commission also require the plaintiff pharmacists to choose between  
14 their livelihood and their religious faith. Mesler believes her employment will be terminated  
15 very soon. Thelen was forced to leave her job and has no guarantees that her new employer  
16 will continue to allow her to decline to dispense Plan B. The Rules and the Commission's  
17 threatened enforcement mean these women may be forced to leave their professions because  
18 they will not dispense one drug out of over 7,000 on the market.

19 Plaintiffs ask this Court to enjoin the defendants, State of Washington officials, from  
20 enforcing the regulations that so clearly violate their religious and moral beliefs and are  
21 contrary to federal law. Plaintiffs seek to enjoin the enforcement of 1) WAC 246-863-095 and  
22 WAC 246-869-010, and 2) RCW 49.60, Washington's Law Against Discrimination, with  
23

1 regard to the refusal by Plaintiffs to stock and dispense Plan B on religious and moral grounds.  
2 The irreparable harm they will experience warrants a preliminary injunction.

3                   **II. FACTUAL BACKGROUND**

4                   **A. The Small Demand for Plan B is Met by Pharmacies that Stock Plan B.**

5                   Approximately 1,370 licensed pharmacies serve the public in Washington State. The  
6 public can also obtain Plan B through physicians' offices, certain government health centers,  
7 hospital emergency rooms, Planned Parenthood and even through the Internet. (Declaration of  
8 Kristen K. Waggoner, Waggoner Decl.). The results of a survey conducted by the Board during  
9 the rule-making process that resulted in the Rules, indicate that 72% of respondents had less  
10 than 25 requests for Plan B per year, or two or less per month.<sup>1</sup> Nearly 13% responded that  
11 their pharmacies had between 26 and 50 requests per year, or at most four per month.  
12 (Waggoner Decl., Survey Results, Exhibit A).

13                   Seventy-seven percent of respondents reported they already stocked Plan B and 21%  
14 that responded indicated they did not stock because of the lack of demand. Only two responded  
15 that they did not stock because of no demand and for religious reasons. *Id.* In the five-year  
16 period ending May 2007, the Board received a *single* complaint regarding a refusal to fill Plan  
17 B based on religious or moral grounds on April 13, 2006. (Waggoner Decl. Exhibit B).

18                   **B. The Board Starts the Rule Making Process.**

19                   Despite the modest demand, the widespread availability and single complaint regarding  
20 Plan B, in April 2006 the Board began the rule-making process to consider a new regulation  
21 regarding the right to refuse to stock and dispense Plan B for moral and religious  
22

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23                   <sup>1</sup> The survey did not offer the choice of a smaller number than 25. Approximately 40% of all pharmacies participated in the survey.

1 considerations. This decision was preceded by a March 10, 2006 presentation to the Board by  
2 Planned Parenthood (PP) and the Northwest Women's Law Center (NWLC), organizations  
3 which publicly oppose the right to refuse to dispense Plan B on religious and moral grounds,  
4 urging the Board to adopt a rule requiring pharmacies and pharmacists to stock and dispense  
5 Plan B regardless of their religious beliefs.

6 On June 1, 2006, the Board met and reviewed "Washington laws related to conscience  
7 clauses and discrimination." (Waggoner Decl., Board Minutes and Proposed Rule, Exhibit C).  
8 The Board rejected the position taken by the PP and NWLC. Instead, it voted unanimously to  
9 accept a new draft rule, which affirmed the right of conscience. (Waggoner Decl., Exhibit C).  
10 The Washington State Pharmacy Association (WSPA) supported this rule (Original Rule).  
11 (Waggoner Decl., WSPA Presentation, Position Statement and Talking Points, Exhibit D).

12 **C. Governor Gregoire Intervenes in Support of a Rule to Forbid Refusal to Stock and**  
**Dispense on Religious and Moral Grounds.**

13 That same day, June 1, 2006, Governor Christine Gregoire wrote a letter to the Board.  
14 She said she "strongly oppose[d] the draft pharmacist refusal rules recommended by the  
15 Washington State Board of Pharmacy.... I have stated my position in two letters, dated  
16 January 18<sup>th</sup> and May 31<sup>st</sup> of this year, emphasizing that no one should be denied appropriate  
17 prescription drugs based on the personal, religious, or moral objection of individual  
18 pharmacists." (Waggoner Decl., Letter from Governor, Exhibit E. See also Exhibit F).

19 At a press conference later that week, Governor Gregoire said the Board "had made a  
20 mistake" and that she would "help them get the right answer." To that end, she threatened  
21 publicly that she would consider the removal of Board members who supported the right of  
22 conscience. (Waggoner Decl., June 3 and June 6, 2006 Press Reports, Exhibit F).

1       On August 28, 2006, the Governor sent a fourth letter to the Board. She proposed an  
2 alternative rule that eliminated the right of conscience for pharmacies and pharmacists who  
3 work as the only pharmacist on duty at their pharmacies. (Governor's Proposal) (Waggoner  
4 Decl., Letter from Governor, Exhibit G).

5       Three days later, the Board voted to "reconsider" its protection of the right of  
6 conscience, the first step to abandoning its Original Rule. On April 12, 2007, the Board voted  
7 unanimously in favor of adopting the substantive provisions of the Governor's Proposal. *See*  
8 WAC 246-863-095 and WAC 246-869-010. (Waggoner Decl., New Rules, Exhibit H).

9       **D. Effect of Regulations Adopted by the Board.**

10       According to the Board, "the rules were sparked by complaints that some pharmacists  
11 and pharmacies refused to fill prescriptions for ...morning after birth control pills or Plan B  
12 drugs." The Board contends that WAC 246-863-095, and WAC 246-869-150, require a  
13 pharmacy to ensure Plan B is dispensed and that a pharmacy must stock Plan B if requested by  
14 a patient. (Waggoner Decl., Department of Health News Release, Exhibit I).

15       The Board has explained that the Rules prohibit a pharmacy from deciding not to stock  
16 Plan B for moral or religious reasons. (Waggoner Decl., Exhibit I and Final Small Business  
17 Economic Impact Statement and Significant Analysis for Rule, Exhibit K). It follows that the  
18 Board prohibits a pharmacy that stocks Plan B from accommodating a pharmacist with a moral  
19 or religious objection unless the pharmacy can provide a second pharmacist, without such  
20 objection, to timely dispense Plan B. *Id.*

21       The Rules also prohibit a pharmacy and pharmacist from discriminating "against a  
22 patient or their agent in a manner prohibited by state or federal laws." During the Board's  
23 consideration of the Rules, the Washington Human Rights Commission, the state agency

1 charged with the rule-making and enforcement of RCW 49.60, Washington's Laws Against  
2 Discrimination ("WLAD"), provided the Board with written and oral testimony. In the  
3 Executive Director's April 17, 2007 letter to the Board, the Executive Director equated refusal  
4 to stock and dispense Plan B on religious grounds with violation of the WLAD:

5 It is illegal and bad public policy to permit pharmacists to deny services to women  
6 based on the individual pharmacist's religious or moral beliefs. We have examined the  
7 issue from federal and state law perspectives, from the public interest, and from  
8 possible defenses and compromises that could be raised and made. On no ground  
9 would refusal to fill a lawful prescription for emergency contraception be appropriate.  
Medical decisions must be made between a woman and her physician - not by the  
pharmacy owner or pharmacist. The Board should establish a policy requiring that  
pharmacists in the State of Washington to fill all lawful prescriptions, or be denied the  
right to practice pharmacy.

10 (Waggoner Decl., Human Rights Commission Letter, Exhibit J). The Executive Director  
11 further stated in his letter that a pharmacist with a religious objection to filling Plan B engages  
12 in sex discrimination in violation of RCW 49.60 even if another pharmacist at the pharmacy  
13 fills the prescription. *Id.* The Executive Director also stated that the pharmacist exposes  
14 herself and her employer to liability if she refuses to fill the prescription. *Id.*

15 As to pharmacies, the Executive Director stated that failure to stock Plan B, even where the  
16 demand is low, is a violation of RCW 49.60 when the predominant reason the pharmacy does  
17 not stock is religious. *Id.* For good measure, he even threatened the Board itself: "Our  
18 interpretation of this statute is that granting pharmacists the ability to deny lawful prescriptions  
19 to women would constitute illegal discrimination on the basis of sex... and could expose the  
20 Board of Pharmacy to liability for writing regulations that are knowingly discriminatory." *Id.*

21 **E. The Board's Investigation of Ralph's Thriftway.**

22 In May 2006, as the Board was deliberating over the conscience right issue, Kevin  
23 Stormans, part owner of Ralph's, received an anonymous call asking whether the store carried

1 Plan B. (Declaration of Kevin Stormans, "Stormans Decl."). At the time, Stormans did not  
2 know whether Ralph's carried Plan B nor did he know much about the drug. A pharmacy  
3 employee told Stormans that Ralph's did not carry Plan B because patients had not requested  
4 it. Stormans told the caller that the store did not carry the product. (Stormans Decl.).

5       Shortly thereafter, Stormans began receiving phone calls and emails from unidentified  
6 individuals complaining that Ralph's should stock Plan B. (Stormans Decl.). These inquiries  
7 prompted Ralph's owners to research Plan B and its effects. Based on data from the United  
8 States Food and Drug Administration and other sources, Stormans concluded that even if  
9 customers should request Plan B, Ralph's could not sell it based on religious and moral  
10 grounds. (Stormans Decl.).

11       Stormans learned that Plan B can stop the implantation of a fertilized egg or embryo.  
12 Stormans believes that Scripture and science support the conclusion that life begins with  
13 fertilization. Stormans' religious beliefs prevent him from selling a drug that intentionally  
14 terminates innocent human life. (Stormans Decl.).

15       After Ralph's made its position known, activist Janet Blanding organized a boycott and  
16 picketing of Ralph's. (Stormans Decl.) Blanding told a local newspaper that she presented a  
17 Plan B prescription to Ralph's on July 20, 2006 and Ralph's would not fill the prescription.  
18 (Stormans Decl., Press Report, Exhibit A). Other activists presented Ralph's with Plan B  
19 prescriptions. *Id.*

20       As with other drugs that are not in stock, Ralph's provided the activists with a list of  
21 nearby pharmacies where they could purchase the drug. There are 33 pharmacies within 5  
22 miles of Ralph's that stock and dispense Plan B. (Stormans Decl.). Blanding and her fellow  
23 activists filed complaints with the Board against Ralph's. (Stormans Decl., Exhibit A).

1       The Board initiated an investigation of Ralph's pharmacist. The investigator  
2 questioned Kevin Stormans about the store's position. Stormans provided a written statement  
3 to the investigator on October 13, 2006. In late 2006, the Board notified Stormans and the  
4 pharmacist that it had closed the investigation and would not discipline Ralph's pharmacist, but  
5 shortly thereafter, in January 2007, the Board initiated a new investigation against Ralph's.  
6 (Stormans Decl.). The investigation is concluded and the Board has referred the matter to its  
7 legal counsel for final review. (Stormans Decl.).

8       **F. The Impact of the Regulations on the Pharmacist Plaintiffs.**

9       Plaintiff Rhonda Mesler is a licensed pharmacist employed in Washington State. Mesler  
10 has practiced in Washington State throughout her 17-year career and currently serves as a  
11 pharmacy manager. (Declaration of Rhonda Mesler) (Mesler Decl.). From childhood, Mesler  
12 wanted to serve as a health-care provider. Her family has spent thousands of dollars to obtain  
13 her Bachelor of Pharmacy degree. Mesler finds great fulfillment in advising and counseling her  
14 patients regarding appropriate medications and their use. *Id.*

15       As a Christian committed to her faith, one of Mesler's core beliefs is that God creates  
16 human life when an egg is fertilized. Plan B can prevent implantation of a fertilized egg and  
17 acts as an abortifacient. Mesler's religious beliefs prevent her from dispensing a drug that  
18 destroys human life. *Id.*

19       Upon her hire, Mesler informed her current employer that she could not dispense Plan B for  
20 religious and moral reasons. Mesler is the only pharmacist on duty during her shift. With her  
21 employer's permission, she has referred the few patients seeking Plan B to nearby pharmacies.  
22 Her employer has told her that it cannot hire a second pharmacist to dispense Plan B. Mesler  
23 expects to be fired from her position after the Rules become effective. *Id.*

1 Plaintiff Margo Thelen has served as a licensed pharmacist for 35 years. Thelen and her  
2 family have had to rely heavily on Thelen's income and benefits. Until June 2007, Thelen  
3 served as a staff pharmacist in a Washington retail pharmacy. Upon her hire, Thelen informed  
4 her employer that her deeply-held religious beliefs prevented her from dispensing Plan B. Like  
5 Stormans and Mesler, Thelen understands that Plan B can prevent implantation of a fertilized  
6 egg. Thelen's religious faith teaches that although the physical structure of the new life is not  
7 yet complete, God has nonetheless created human life with a soul once fertilization occurs. As  
8 a health-care provider and a Christian, Thelen believes it would be immoral to dispense a drug  
9 that terminates that life. *Id.*

10 During her employment, no more than four customers requested that Thelen fill a Plan B  
11 prescription. With the approval of her employer, Thelen referred those four customers to  
12 nearby pharmacies. (Thelen Decl.). When Thelen learned that the Board of Pharmacy passed  
13 the new regulations, she contacted the Board to make sure she understood them. A  
14 representative of the Board told Thelen that the new regulations required her store to dispense  
15 Plan B upon a patient's request. (Thelen Decl., Exhibit A). Thelen's employer informed her  
16 that it could not hire another pharmacist to work with her or to remain on call. Thelen was  
17 forced to leave her employment. *Id.*

18 Thelen was unable to find a pharmacy position within her local community. She had to  
19 accept a job with a much longer commute, less income, and work hours that keep her away  
20 from home until nearly 10:00 p.m. on many work nights. *Id.* For the time being, Thelen's new  
21 employer has agreed to try to accommodate her religious convictions, but this accommodation  
22 is not guaranteed. If Thelen's supervisor changes his mind or her work circumstances change,  
23

she could lose her position because of her religious objection. The new regulations would also continue to substantially limit her future work opportunities. *Id.*

### III. ARGUMENT

#### **A. Standard for Preliminary Injunction**

The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties. To obtain a preliminary injunction, a party must demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor.... These two alternatives represent 'extremes of a single continuum,' rather than two separate tests ... Thus, the greater the relative hardship to [the party seeking the preliminary injunction,] the less probability of success must be shown. (citation omitted).

*Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).

“[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [favor of the party alleging First Amendment injury].” *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973 (9th Cir.2002). In the First Amendment context, all that is necessary to establish irreparable injury to support an injunction is a colorable First Amendment claim. *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005).

**B. There is a High Probability Plaintiffs Will Prevail on the Merits.**

### **1. Free Exercise Clause.**

Defendants' actions place a substantial burden on the Plaintiffs religious exercise.  
Plaintiffs believe that human life begins with the fertilization of an egg, which becomes a fertilized embryo. Plan B prevents implantation of the fertilized embryo on a woman's uterus, terminating the pregnancy and destroying a human life. Plaintiffs believe that only God, the author of that life, may end it. Plaintiffs exercise their religious beliefs by refusing to stock and

1 distribute Plan B. The Rules and WLAD place a substantial burden on the exercise of  
2 plaintiffs' religious beliefs by imposing sanctions, including the loss of their licenses, and thus  
3 the loss of their livelihoods, if they refuse to distribute and dispense Plan B.

4       The Rules and the WLAD are not neutral or of general application. “[I]f the object of a  
5 law is to infringe upon or restrict practices because of their religious motivation, the law is not  
6 neutral (citation omitted) and it is invalid unless it is justified by a compelling interest and is  
7 narrowly tailored to advance that interest.” *Church of Lukumi Babalu Aye, Inc., v. City of*  
8 *Hialeah*, 508 U.S. 520, 533, (1993).

9       Facial neutrality in the law’s text does not end the inquiry. “Official action that targets  
10 religious conduct for distinctive treatment cannot be shielded by mere compliance with the  
11 requirement of facial neutrality. The Free Exercise Clause protects against governmental  
12 hostility which is masked, as well as overt.” *Id.* at 534. Courts look to the record of  
13 enactment, and the effect of a law in its real operation, to determine its objective. *Id.* at 535.

14       The rule-making history of the Rules reveals that the Rules were enacted to eliminate  
15 health care providers’ rights of conscience based on religious or moral considerations. Despite  
16 the wide availability of Plan B, and only a single patient complaint, the Board initiated the  
17 rule-making process a month after Planned Parenthood and other activist groups urged the  
18 Board to force health care providers to stock and distribute Plan B. “The rules were sparked by  
19 complaints that some pharmacists and pharmacies refused to fill prescriptions for emergency  
20 contraceptives—also known as morning after birth control pills or Plan B.” (Waggoner Decl.,  
21 Exhibit I).

22       The *sine qua non* development in the rule-making process, crystallizing the object of  
23 the Rules, was the Governor’s extraordinary intervention. The day the Board unanimously

1 decided to include a conscience right, June 1, 2006, Governor Gregoire wrote the Board: I  
2 “strongly oppose[d] the draft pharmacist refusal rules recommended by the Washington State  
3 Board of Pharmacy.... I have stated my position in two letters ... emphasizing that no one  
4 should be denied appropriate prescription drugs based on the personal, religious, or moral  
5 objection of individual pharmacists.” Later that week she threatened to remove members of  
6 the Board who opposed her. On August 28, 2006, the Governor sent a final letter to the Board,  
7 demanding an alternative rule that eliminated a right of conscience for pharmacies and  
8 pharmacists. Three days later the Board abandoned its original draft to adopt the substance of  
9 the Governor’s proposal. The record of enactment shows that the “the object of [the] law [was]  
10 ... to restrict practices because of their religious motivation.” *Lukumi*, 508 U.S. at 503.

11 There is no dispute regarding the “real effect of the law in its operation.” The right of  
12 conscience, explicitly protected in the initial draft before the Governor intervened, is  
13 noticeably absent from the Rules. Religious beliefs of pharmacy owners and pharmacists are  
14 no longer a proper basis for refusing to stock and or distribute Plan B. The legal effect of the  
15 Rules show the Board’s objective is to restrict health providers’ religious practice.

16 As to the WSHRC’s threatened enforcement of RCW 49.60 against pharmacies that do  
17 not stock Plan B on religious grounds, it too is subject to strict scrutiny. A law granting an  
18 exemption that undermines the law’s purpose is underinclusive and not a neutral law of general  
19 applicability. *Lukumi*, 508 U.S. at 543. Laws are under inclusive if they prohibit some  
20 conduct while allowing other similar conduct. *Id.* RCW 49.60, for example, exempts  
21 religious or sectarian institutions (RCW 49.60.040 (10)), and thus pharmacies in a Catholic  
22 hospital, for example, may refuse to stock Plan B thereby undermining the interest of the anti-  
23 discrimination laws claimed by WSHRC. The WSHRC’s interpretation of RCW 49.60 and its

1 enforcement position is therefore subject to strict scrutiny. The Rules and RCW 49.60 are not  
2 neutral or of general application.

3 Defendants cannot carry their burden of showing the Rules and WLAD advance a  
4 compelling interest and are narrowly tailored to effectuate that interest. “A law burdening  
5 religious practice that is not neutral or not of general application must undergo the most  
6 rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of  
7 religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in  
8 pursuit of those interests.” *Id. at 546; Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). . “A law  
9 that targets religious conduct for distinctive treatment or advances legitimate governmental  
10 interests only against conduct with a religious motivation will survive strict scrutiny only in  
11 rare cases.” *Lukumi*, 508 U.S. at 546. The government carries the burden of demonstrating an  
12 interest of the highest order and that it has written the law in the narrowest of means to achieve  
13 that interest.

14 The Board lacks – a legitimate – let alone compelling, interest in forcing health care  
15 providers to violate their religious beliefs by distributing Plan B. The stated interest is to “to  
16 improve state-wide access and reduce barriers for patients seeking” FDA approved drugs and  
17 devices. (Waggoner Decl., Final SBEIS, Exhibit K). As discussed above, the Rules seek to  
18 advance these goals by requiring pharmacies to stock Plan B and to employ at least one  
19 pharmacist who will dispense it.

20 According to the Board’s own survey of licensed pharmacies, the modest demand for  
21 Plan B is being met. Seventy-two percent of respondents had less than 25 requests for Plan B  
22 *per year*, 13% had between just 26 and 50 requests per year. Fully 98% of respondents  
23 reported they already stocked Plan B or would stock it if warranted by customer demand. Only

1   two respondents indicated they had religious objections to stocking the drug. Not surprisingly,  
2   the Board did not receive any complaints about lack of access to Plan B before it began its  
3   rule-making process. Under these circumstances, “improving state-wide access” is hardly an  
4   “interest of the highest order.”

5       Even if *arguendo*, access to Plan B was a compelling interest the Rules are not  
6   narrowly tailored to achieve that interest. A glaring gap in the Board’s record is the lack of  
7   support for the conclusion that eliminating the conscience right was the only way to “improve  
8   state-wide access” to Plan B. Ralph’s is located within five miles of 33 pharmacies that stock  
9   and dispense Plan B. Ralph’s policy is to provide customers with a list of area pharmacies that  
10   carry drugs they do not. Thelen and Mesler likewise refer patients to nearby pharmacies for  
11   drugs not stocked by their respective pharmacies. Requiring pharmacies and pharmacists to  
12   simply refer customers to alternative pharmacies in their area would advance the interests of  
13   the Rules without suppressing pharmacy owners’ and pharmacists’ religious beliefs. Instead  
14   the Board drafted a rule with the broadest possible language, forcing pharmacies and  
15   pharmacists to carry and dispense Plan B regardless of their religious and moral objections to a  
16   drug that unnaturally terminates a woman’s pregnancy.

17       Perhaps more troubling than choosing the most intrusive method of advancing their  
18   claimed interest, when an alternative existed that would not burden religious freedom, the  
19   Board placed a substantial burden on religious exercise without a serious investigation as to  
20   whether conscientious objectors were in fact responsible for preventing women from obtaining  
21   Plan B. To this day, the Board does not know which communities, if any, are served by a  
22   single pharmacy that does not offer Plan B because of religious reasons as opposed to lack of  
23   demand. The survey conducted by the Board does not identify the name or location of the

1 respondents. Rather, it appears the Board relied on anecdotal evidence—chiefly the  
2 complaints of activists against Ralph's.<sup>2</sup> (Waggoner Decl., Exhibit B.) The Board simply  
3 assumed pharmacies and pharmacists exercising their religious beliefs might create a  
4 significant barrier to patients timely obtaining Plan B. The First Amendment requires more  
5 than an assumption before countenancing a substantial burden on religious freedom on the  
6 grounds it is the least restrictive means. *Sherbert v. Verner*, 374 U.S. 398, 407, (1963).

7 Defendants seek to force Plaintiffs to violate their deeply held religious beliefs, without  
8 a legitimate or compelling interest by forcing them to stock and dispense a drug that is readily  
9 available elsewhere. This violation of the Plaintiffs' rights will result in irreparable harm, in  
10 the potential lose of their professional licenses, jobs, income to support their family, or in a  
11 severe violation of religious beliefs, with no real benefit to the state's interest in providing  
12 access to Plan B. The potential harm to the Plaintiff far outweighs any inconvenience to  
13 customers seeking Plan B. Plaintiffs' have raised a colorable, and probably successful, Free  
14 Exercise claim, which is sufficient to satisfy the element of irreparable harm. *Warsoldier v.*  
15 *Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005).

16       **2. Equal Protection Violation.**

17       The Washington Legislature recognizes the unalienable right enjoyed by all individuals  
18 in the state: "every individual possesses a fundamental right to exercise their religious beliefs  
19 and conscience." RCW 48.43.065(1) and RCW 70.47.160(1).<sup>3</sup> These particular statutes  
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<sup>2</sup> The Board's record of all complaints it received over a five year period ending in May 2007 shows that all but  
22 the April 13, 2006 complaint were by activists against Ralph's or pharmacies nearby Ralph's, cases 10577-10592,  
10657-10663 and 10680-10713 received from July 31, 2006 to November 3, 2006.

23       <sup>3</sup> "(1) The legislature recognizes that every individual possesses a fundamental right to exercise their religious  
beliefs and conscience. The legislature further recognizes that in developing public policy, conflicting religious  
and moral beliefs must be respected...."

1 reiterate that right and explain how the right is to be preserved for health care providers  
2 furnishing services to enrollees in the state's basic health care insurance plan while establishing  
3 a mechanism that makes the plan's services accessible to all enrollees. That mechanism  
4 includes disclosure of the religious objection and the names of other providers offering the  
5 same health care services. RCW 48.43.065(2)(b). The Rules purport to deny this fundamental  
6 right of conscience to pharmacists and pharmacy owners, in essence, creating a second class of  
7 health care providers stripped of the right to freedom of religious belief and conscience.<sup>4</sup>

8       The Equal Protection Clause is violated when a law treats similarly situated persons  
9 differently when there is no rational basis for drawing such a distinction or in the case of  
10 impinging a fundamental right or a suspect class, if the classification does not promote a  
11 compelling governmental interest and is not narrowly tailored to effectuate the purpose of the  
12 law. Religious belief, as the statutes recognize, is a fundamental right. Strict scrutiny analysis  
13 is required. *Droz v. Commissioner of IRS*, 48 F.3d 1120 (9th Cir. 1994). (For equal protection  
14 purposes, heightened scrutiny is applicable to a statute that applies selectively to religious  
15 activity if the plaintiff can show that the basis for the distinction was religious, not secular.)

16       The Board has passed a regulation that excludes pharmacies and pharmacists from the  
17 protections enjoyed by other health care providers. This new regulation requires disparate  
18 treatment between similarly situated health care providers. The Board has the burden of  
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20 (2)(a) No individual health care provider, religiously sponsored health carrier, or health care facility may be  
21 required by law or contract in any circumstances to participate in the provision of or payment for a specific service  
22 if they object to doing so for reason of conscience or religion. No person may be discriminated against in  
23 employment or professional privileges because of such objection

4 Defendants may claim the fundamental right of conscience referred to in RCW 48.43.065(1) and RCW  
70.47.160(1) applies narrowly to health care providers participating in the basic health care plan. This construction  
would read "fundamental right" out of these statutes. But even if such a construction could be successfully  
defended, it would deny the conscience right to pharmacists and pharmacy owners furnishing drugs to enrollees  
while protecting all other health care providers participating in the plan who refuse to provide services on religious  
grounds, including the doctor who refuses to write a Plan B prescription.

1 advancing a compelling interest for excluding pharmacies and pharmacists while protecting  
2 other providers. *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003).

3 As discussed in the previous section regarding Defendants' Free Exercise violation,  
4 Defendants cannot advance a compelling interest served by the Rules and in the least  
5 restrictive manner. Defendants claim the interest advanced by the rule is "to improve state-  
6 wide access and reduce barriers for patients seeking Plan B." And yet health care providers  
7 who, for example, perform such vital services as tuberculosis vaccinations, chemotherapy  
8 treatments, and deliveries enjoy a right of conscience. Indeed, the fundamental right of  
9 conscience reiterated by the above statutes *exempts doctors from writing Plan B prescriptions*  
10 *on religious grounds*. If the Legislature has excused health care providers on the basis of  
11 religious belief from furnishing these vital services, and doctors from prescribing Plan B, than  
12 it is doubtful the defendants will be able to carry their burden of demonstrating that increasing  
13 the availability of Plan B is a compelling state interest. And as discussed in the previous  
14 section, burdening plaintiffs' religious freedom is not the least restrictive means for advancing  
15 this interest.

16 A separate, but related inequality of the Rules is the disparate treatment of solo-  
17 pharmacists. Though all pharmacists are similarly situated – receiving similar training and  
18 education and qualify in the same way for a license – the Rules treat them differently. A  
19 pharmacist refusing to distribute Plan B who works in a setting where a non-refusing  
20 pharmacist is also on duty has a conscience right—he is permitted to decline and have the other  
21 pharmacist fill the order. But a solo-pharmacist, like Mesler, must fill Plan B orders and  
22 violate her conscience. Thus, in effect, the Rules allow disparate treatment based on the  
23 decisions of employers or differing business models. A rule that withdraws a fundamental right

1 from one group and extends it to another, similarly situated group on such arbitrary grounds  
2 does not satisfy strict scrutiny analysis. If the Defendants can permit the refusing pharmacist  
3 to refer the Plan B request to another pharmacist at his work site, they could have permitted the  
4 solo-pharmacist to refer the patient with a Plan B prescription to a pharmacist in a nearby  
5 pharmacy. Defendants will not be able to satisfy strict scrutiny analysis.

6         Similarly, the selective enforcement of the WSHRC to enforce the anti-discrimination  
7 laws against pharmacies and pharmacists violates the Equal Protection Clause. The WSHRC  
8 maintains conscience rights are illegal when exercised by pharmacists in violation of RCW  
9 49.60. (Ex. J, Waggoner Decl.) And yet it is unlikely the WSHRC has enforced the anti-  
10 discrimination laws against doctors who refuse on conscience grounds to write a prescription  
11 for Plan B to a patient enrolled in insurance plans.<sup>5</sup> Nor has the WSHRC challenged the  
12 validity of the statutes protecting health care providers treating enrollees.

13         The WSHRC may not, therefore, treat disparately pharmacists' religious beliefs on the  
14 one hand and permit doctors' religious beliefs on the other without showing a compelling  
15 governmental interest and that the least restrictive means are employed to advance that interest.  
16 As argued above, there is no compelling state interest advanced by forcing health care  
17 providers to distribute a drug already available in the market in violation of their religious  
18 beliefs, especially when the Board's interest can be furthered by simply requiring pharmacists  
19 to refer customers to nearby pharmacies without impairing plaintiffs' religious freedom.<sup>6</sup>  
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<sup>5</sup> Nor has the WSHRC publicly threatened doctors and other health care providers who refuse to perform abortions or offer other forms of birth control.

22         <sup>6</sup> Significantly, after reiterating the fundamental right of conscience, RCW 48.43.065(1) and RCW 70.47.160(1) provide a least restrictive mechanism for protecting enrollee access to services when a health care provider refuses to perform a service on religious grounds. The enrollee is provided with a list of other health care providers who offer the same service. RCW 48.43.065(2)(b)(ii).

1                   **3. Procedural Due Process Claim.**

2         Plaintiffs qualified for and received licenses to practice pharmacy and to dispense  
3 pharmaceuticals. Their licenses, occupations and business constitute property and liberty  
4 interests protected by the Due Process Clause of the Fourteenth Amendment. That property  
5 and liberty interest encompasses "a fundamental right to exercise their religious beliefs and  
6 conscience" as recognized in RCW 48.43.065(1) and RCW 70.47.160(1). Consequently, the  
7 Rules impair plaintiffs' liberty and property interests without due process of law.

8         "Liberty interests protected by the Fourteenth Amendment may arise from two sources-  
9 the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466  
10 (1983); *see also Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481  
11 U.S. 1069 (1987). "A state may create a constitutionally protected liberty interest by  
12 establishing regulatory measures that impose substantive limitations on the exercise of official  
13 discretion." *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 844 (9th Cir.1985). When  
14 a person's license to pursue a calling or profession is taken away or interfered with by the state  
15 in a substantial fashion, a plaintiff may demonstrate a due process violation. *Swinehart v.*  
16 *McAndrews*, 221 F. Supp. 2d 552 (E.D.Pa. 2002.); *D'Ambra v. City of Providence*, 21 F. Supp.  
17 2d 106 (D.R.I. 1998) (An individual has a property right, for purposes of due process or the  
18 takings clause, in a license that a government official denies upon a ground other than one that  
19 comes within the scope of the official's authority.)

20         Plaintiffs' interests in their respective licenses are significant. Ralph's Thriftway  
21 depends on business generated by the pharmacy. Plaintiffs, Mesler and Thelen, have practiced  
22 as pharmacists nearly their entire work life. They have no other profession. Without their  
23 licenses, Plaintiffs will suffer significant financial losses and the loss of very fulfilling careers.

1 Defendants exceeded their authority and arbitrarily interfered with plaintiffs' licenses and  
2 livelihood by enacting and seeking to enforce the Rules which contradict the "fundamental  
3 right" of conscience conferred by statute on Plaintiffs as licensees.

4 **C. Supremacy Clause Violation.**

5 Under 42 U.S.C. 2000e-7, any state law "which purports to require or permit the doing  
6 of any act which would be an unlawful employment practice under this subchapter" is  
7 presumptively invalid and unenforceable under the Supremacy Clause of Article VI of the U.S.  
8 Constitution. The Civil Rights Act of 1964, 42 U.S.C. 2000e-2 prohibits employers from  
9 discriminating against any employee with respect to religion. The Rules and the Human Rights  
10 Commission's publicly stated enforcement position require Washington employers such as  
11 Stormans to take adverse employment action against the plaintiff pharmacists based on their  
12 religious beliefs and practices, "an unlawful employment practice" under Title VII, 42 U.S.C.  
13 2000e-7 and Article VI of the United States Constitution.

14 This is because the Rules require pharmacies to employ at least one pharmacist at all  
15 times to dispense Plan B. For many, if not most, pharmacies it is not economically feasible to  
16 employ two pharmacists: the pharmacist whose conscience prevents her from dispensing Plan  
17 B and a second pharmacist who will dispense Plan B. Plaintiff Mesler is a solo-pharmacist and  
18 her employer has indicated that it cannot afford to employ two pharmacists and so she fears that  
19 her employer will terminate her. (Mesler Decl.).

20 The May 17, 2006 letter of the Executive Director of the Washington State Human  
21 Rights Commission is posted on its official website<sup>7</sup> as a warning to pharmacist employers.  
22 (Waggoner Decl., Exhibit J).The WSHRC declares that any pharmacist who refuses to dispense  
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1 Plan B on religious grounds, even if a second pharmacist is on duty who will dispense the drug,  
2 is an act that exposes herself and her employer to an enforcement action under RCW 49.60.

3 It is also WSHRC's position that allowing a practice of "refuse and refer" as a means of  
4 addressing this issue [religious objections to filling Plan B orders], allows and perpetuates  
5 discriminatory behavior.... Our interpretation of this statute [RCW 49.60.010] is that  
6 granting pharmacists the ability to deny lawful prescriptions to women would constitute  
7 illegal discrimination on the basis of sex under the Washington Law Against  
Discrimination, would expose pharmacists to significant legal liability for such  
discriminatory, and hence, illegal acts, would similarly expose stores and corporations,  
under whose purview pharmacists operate, under the law of agency, and could expose the  
Board of Pharmacy to liability for writing regulations that are knowingly discriminatory

8 (Waggoner Decl., Exhibit J). Moreover, the Executive Director explains (incorrectly) to  
9 employers that they are relieved from the accommodation requirement of Title VII and may  
10 take an adverse employment action against a pharmacist who refuses to fill based on sincerely  
11 held religious beliefs. However, employers can accommodate pharmacists' religious beliefs  
12 without undue hardship by permitting them to refer Plan B requests to nearby pharmacies, or  
13 "refuse and refer." But the WSHRC expressly rejects this accommodation and characterizes it  
14 as an illegal act that it claims places the employer in jeopardy of violating RCW 49.60. The  
15 Rules and the WSHRC's rejection to "refuse and refer" violate the Supremacy Clause.

16 **D. Without Court Intervention Plaintiffs Will Sustain Irreparable Harm.**

17 Having shown the likelihood of success on the merits, including "a colorable First  
18 Amendment" claim, plaintiffs' showing of relative harm need only be minimal based on the  
19 Ninth Circuit single continuum test.

20 First, Plaintiffs' colorable First Amendment claim satisfies the irreparable harm  
21 element. "In the Ninth Circuit, a party seeking preliminary injunctive relief in a First  
22 Amendment context can establish irreparable injury sufficient to merit the grant of relief by

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23 <sup>7</sup> <http://www.hum.wa.gov/Women's%20Issues/Index.html>

1 demonstrating the existence of a colorable First Amendment claim.” *Warsoldier v. Woodford*,  
2 418 F.3d 989, 1001 (9<sup>th</sup> Cir. 2005).

3 Second, permitting the defendants to enforce the Rules and RCW 49.60 against  
4 pharmacists and pharmacies that object on religious grounds subjects them to the burdensome  
5 choice of either exposing themselves to disciplinary action, the loss of their livelihoods, plus  
6 penalties and legal fees under the WLAD, if they stand firm and do not violate their religious  
7 beliefs on the one hand or capitulate and violate their religious beliefs on the other. See  
8 *Vietnamese Buddhism Study Temple v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1173  
9 (C.D.Cal. 2006). (City enjoined from enforcing zoning ordinance against temple because  
10 enforcement order subjected them to “burdensome choice” between misdemeanor liability and  
11 discontinuing worship services.)

12 Third, the balance of relative hardships sharply tips in favor of pharmacies and  
13 pharmacists with religious objections. Defendants cannot show any harm if the preliminary  
14 injunction should issue. The Board’s own survey supports the conclusion that the modest  
15 demand for Plan B can be filled by the 98% of respondents who stock it or would if the  
16 demand warranted it. Plaintiffs have also demonstrated the wide availability of the drug in  
17 their communities.

18 By contrast, the harm to plaintiffs is significant. They must choose between exposing  
19 themselves to the loss of their licenses, livelihoods and an anti-discrimination enforcement  
20 action and violating their consciences. At least 15% of Ralph’s business is from the pharmacy  
21 itself. (Stormans Decl.). A substantially higher portion of Ralph’s business comes from the  
22 customers the pharmacy customers who also purchase groceries in the store. *Id.* Mesler  
23 depends on her income and benefits to support her husband, a private school teacher, and her

1 three children, one of whom must reside in a special needs home. Thelen relies heavily on her  
2 income and employment benefits to support her family.

3 When contesting the constitutionality of a statute, “it is not necessary that [the plaintiff]  
4 first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that  
5 he claims deters the exercise of his constitutional rights.” *Babbitt v. United Farm Workers*  
6 *Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). “When the plaintiff has alleged an  
7 intention to engage in a course of conduct arguably affected with a constitutional interest, but  
8 proscribed by a statute, and there exists a credible threat of prosecution thereunder,’ he ‘should  
9 not be required to await and undergo a criminal prosecution as the sole means of seeking  
10 relief.” *Id.* (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). See *Canatella v. State of*  
11 *California*, 304 F.3d 843, 852 (9<sup>th</sup> Cir. 2002) (“We are not so quick to render Canatella [an  
12 attorney] a “hapless plaintiff between the Scylla of intentionally flouting … [the] law and the  
13 Charybdis of forgoing what he believes to be constitutionally protected activity in order to  
14 avoid becoming enmeshed in a [bar disciplinary] proceeding”). The Board has completed its  
15 investigation against Ralph’s and the store now expects charges to be filed. Plaintiff Mesler  
16 expects to be terminated from her employment soon. Plaintiff Thelen has no guarantee that her  
17 new position, with less income and more difficult work hours, will continue to permit her  
18 conscientious objection.

19 Only by enjoining the enforcement of the Rules and the WLAD, can the Plaintiffs avoid  
20 being forced to intentionally flout the law or foregoe constitutionally protected activity. “The  
21 loss of First Amendment freedoms, for even minimal periods of time, unquestionably  
22 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). To summarize,  
23

1 plaintiffs have shown both the likelihood of success on the merits and that the balance of  
2 hardships tips in their favor. A preliminary injunction should issue.

3           **E. A Bond is Not Warranted**

4           The court has wide latitude to set an amount that will minimize the burden on a party  
5 where there is a strong likelihood of prevailing on the merits or the defendant cannot  
6 demonstrate damages arising from a wrongful injunction. In such cases, a court need not  
7 require a bond at all. *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9<sup>th</sup> Cir. 2000).

8           **V. CONCLUSION**

9           For the foregoing reasons, plaintiffs respectfully request an order enjoining defendants  
10 from enforcing the Rules and the WLAD against them pending trial and any appeals.

11           DATED this 26<sup>th</sup> day of July, 2007.

12           Respectfully submitted,

13           

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